

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELMORE NICHOLS, JR.,

Defendant-Appellant.

UNPUBLISHED

June 17, 2014

No. 315284

Wayne Circuit Court

LC No. 12-008776-FH

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

After a bench trial, the trial court convicted defendant of first-degree home invasion, MCL 750.110a(2). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to an enhanced term of 280 months' to 60 years' imprisonment. Defendant appeals as of right. We affirm in part, vacate in part and remand for resentencing.

Defendant initially avers that we must grant him a new trial because the trial court summarily denied his request to represent himself. Criminal defendants enjoy constitutional rights to the assistance of counsel. US Const, Ams VI, XIV; Const 1963, art 1, § 20. However, a defendant may opt to waive the right to the assistance of counsel and undertake his own representation. *People v Russell*, 471 Mich 182, 188; 648 NW2d 745 (2004). "The United States Supreme Court recognizes self-representation as an implicit constitutional right," while in Michigan criminal defendants have an explicit constitutional and statutory "right to proceed in propria persona." *People v Adkins (After Remand)*, 452 Mich 702, 720; 551 NW2d 108 (1996), citing Const 1963, art 1, § 13; MCL 763.1, overruled in part on other grounds in *Williams*, 470 Mich at 641 n 7.

We review "for clear error the trial court's factual findings surrounding a defendant's waiver" of his right to counsel. *Russell*, 471 Mich at 187. But we review de novo the legal issues inherent in the court's ruling on "the application of a constitutional standard to . . . uncontested facts." *Id.*

"Proper compliance with the waiver of counsel procedures set forth by th[e Michigan Supreme] Court is a necessary antecedent to a judicial grant of the right to proceed in propria persona." *Adkins*, 454 Mich at 720-721.

Proper compliance requires that the court engage, on the record, in a methodical assessment of the wisdom of self-representation by the defendant. The defendant must exhibit an intentional relinquishment or abandonment of the right to counsel, and the court should indulge every reasonable presumption against waiver.

. . . [I]f a judge does not believe the record evidences a proper waiver, the judge should note the reasons for h[er] belief and require counsel to continue to represent the defendant. [*Id.* at 721 (internal quotation and citation omitted).]

When a defendant voices a desire to represent himself, the court must ascertain that (1) the defendant made an unequivocal request, (2) the defendant asserted “his right knowingly, intelligently, and voluntarily through a colloquy advising [him] of the dangers and disadvantages of self-representation,” and (3) “the defendant’s self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court’s business.” *Russell*, 471 Mich at 190; see also *Adkins*, 454 Mich at 721-722.

The prosecutor concedes that the trial court “did not ask questions of Defendant regarding his request . . . to represent himself,” but contends that the court’s failure does not justify the reversal of his conviction because defendant only equivocally asked to represent himself. At the beginning of the first day of defendant’s bench trial, defense counsel informed the trial court that defendant wished to discontinue her representation because of a disagreement involving a request for forensic retesting. The court denied defendant’s request, but he never suggested that he wanted to represent himself. After the prosecutor’s opening statement, defense counsel advised the court that defendant wanted to leave the courtroom, and he departed to a nearby holding cell. Defendant again failed to express a desire to represent himself, and the first witness, one of the home invasion victims, testified.

The trial court permitted defense counsel to ascertain whether defendant had any questions for the first witness. On returning to the courtroom, defense counsel informed the court that defendant “now wants to represent himself.” In relevant part, the court denied defendant’s request:

Tell him it’s not happening today. I’m not going to have one more second of a trial . . . adjournment or anything else. . . .

* * *

We’re in the middle of trial, and it’s not happening.

* * *

Okay. Now, what you have to understand, and I’m going to tell the Court of Appeals, he was here when we started this morning.

* * *

And you said that he did not want you to represent him.

* * *

And I said, I'm sorry, you're ordered to continue your representation.

* * *

He wants to do . . . another DNA expert, another DNA test. He wants to do anything to delay the trial, and I'm not permitting it. And I'm not permitting him to suddenly decide he wants to represent himself. He could have said that when he sat here, when he walked in this morning. He did not do any of that. What he's trying to do is delay the trial, and to put in appellant [sic] issues. It's not going to happen today.

* * *

Now, I said, no, he cannot represent himself at this point. I'm ordering you to represent him. And I'm not going to run back and forth, and bring him back out, and get onto the floor and beg him to go to trial. He's in trial.

Because defendant mentioned self-representation only after moving to disqualify his counsel on the first day of trial and absenting himself from the courtroom, the trial court did not clearly err in implicitly finding that defendant made an equivocal request for self-representation. *Russell*, 471 Mich at 187. Furthermore, the trial court did not clearly err in observing that defendant's midtrial request to represent himself would "disrupt, unduly inconvenience, and burden the court and the administration of the court's business." *Russell*, 471 Mich at 190. Consequently, the court properly denied defendant's request.

Defendant next argues that the trial court erred in denying without investigation his motion to discharge defense counsel. We review for an abuse of discretion a "trial court's decision regarding substitution of counsel." *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001); see also *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011). An abuse of discretion exists if the trial court makes a decision that "falls outside the range of reasonable and principled outcomes." *Id.* at 397 (internal quotation and citation omitted).

"An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." [*Traylor*, 245 Mich App at 462, quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).]

"A mere allegation that a defendant lacks confidence in his or her attorney, unsupported by a substantial reason, does not amount to adequate cause. Likewise, a defendant's general unhappiness with counsel's representation is insufficient." *Strickland*, 293 Mich App at 398.

Defendant's brief on appeal identifies no specific good cause warranting the discharge or substitution of defense counsel. Before trial commenced, defense counsel told the court that defendant "asked [her] to request retesting of" forensic evidence found on a water bottle inside the victims' apartment. Analysis by the police crime laboratory identified defendant's DNA profile on the bottle. Defense counsel disavowed that forensic retesting was necessary in light of the theory that the defense intended to pursue at trial, that someone other than defendant left a bottle bearing his DNA in the victims' apartment. Defense counsel added that she had informed defendant that "it is not the Defense's position to provide the Prosecution with additional evidence against him, based on what he has told me his defense is." Immediately thereafter, defense counsel stated, "After those discussions, [defendant] informs me he no longer wishes my representation." The trial court ordered defense counsel to remain as defendant's counsel, and explained, "I am not going to have anybody delaying trials, waiting until the last second. We've already . . . put in all the money and everything. We got the witnesses here. . . . We are not going to adjourn this matter anymore."

The trial court acted within its discretion in denying defendant's request to dismiss his counsel because he did not establish good cause for a substitution. *Strickland*, 293 Mich App at 397-398; *Traylor*, 245 Mich App at 462. The record reveals that the dispute over forensic retesting did not involve a fundamental trial tactic. *Id.* at 462. The record also substantiates the trial court's determination that the discharge of defense counsel on the morning scheduled for trial would "unreasonably disrupt the judicial process." *Id.*

Defendant lastly submits that the trial court erred in scoring offense variable (OV) 13. This issue concerns "the proper interpretation and application of the statutory sentencing guidelines, which are both legal questions that this Court reviews de novo." *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

The trial court scored 10 points for OV 13 pursuant to MCL 777.43(1)(d), which contemplates this scoring when "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property." At the sentencing hearing, defendant objected to the scoring of OV 13 on the basis of his 1982 convictions in Alabama. *Nichols v State*, 422 So 2d 804 (1982, Ala App).¹ Defendant argued that the observation in MCL 777.43(2)(a), which authorized the calculation of OV 13 by taking into account "all crimes within a 5-year period, including the sentencing offense," plainly precluded any consideration of convictions in 1982. The trial court overruled the objection, finding that the conduct involved in the 1982 case and this case established a pattern. The court also apparently counted the 1982 convictions because the present crime occurred within five years of defendant's release from his Alabama imprisonment. Although the prosecutor asserts that the trial court also likely took into account other convictions of defendant, the record does not contain a presentence information report (PSIR), and the Department of Corrections website

¹ In *Nichols*, the trial court sentenced defendant to 30 years' imprisonment for a first-degree rape conviction. *Id.* at 804. At trial, two other Alabama rape victims testified about similar assaults by defendant. *Id.* at 804-806.

discloses only two active or inactive sentences: two first-degree home invasion convictions, the present offense that he committed in June 2012, and a jury trial conviction for an offense committed in July 2012.

The incomplete available record does not support the trial court's assignment of 10 points for OV 13. A sentencing information report in the record reflects that first-degree home invasion is a class B offense against a person, MCL 777.16f, and the trial court scored defendant's prior record variables at 77 and his offense variables at 30, which placed defendant in the F-III sentencing grid. MCL 777.63. Under MCL 777.63, a reduction of defendant's offense variable score by 10 points would result in his placement in a different sentence range, F-II. We thus vacate defendant's sentence and remand for resentencing only. *Francisco*, 474 Mich at 89-92. On remand, the trial court must ascertain and articulate the crimes occurring within a period of five years, including the sentencing offense. If "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of" MCL 333.7401(2)(a)(i) to (iii) or MCL 333.7403(2)(a)(i) to (iii), then the trial court may impose the same sentence. Absent such a determination, the trial court shall sentence in accordance with the recalculated sentencing guidelines or provide substantial and compelling reasons for departing from the guidelines.

We affirm defendant's conviction, vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly